

Before Mr. Justice Blair and Mr. Justice Banerji.

HUSAIN BAKHSH (DEFENDANT) v. DAMAR SINGH AND ANOTHER  
(PLAINTIFFS).\*

1904  
April 11.

*Pre-emption—Wajib-ul-arz—Interpretation of document—“Co-sharer”—  
Owner of an isolated plot of sir land.*

Lal Singh and Thakur Das, joint owners of zamindari and *sir* land, made a grant of the *sir* land to their step-mother for maintenance during her life, with a reversion to themselves after her death. Subsequently the rights of Lal Singh in the zamindari, “except the rights in the *sir*,” were sold by auction. After the death of the grantee the *sir* land came into the possession of the son of Lal Singh, who sold a portion of it. *Held* that such a sale could not give rise to a right of pre-emption, not being within the terms of the *wajib-ul-arz* a transfer by a shareholder in the village.

THE facts of this case were as follows:—

Lal Singh and Thakur Das were the joint owners of a 10 biswa share in mauza Dhanari. They made a grant of 63 bighas 11 biswas of *sir* land to their step-mother, Kohem Kunwar, for her life. On her death the property was to revert to them. Then Lal Singh’s rights “except his rights in the *sir*,” were sold by Government auction and purchased by the father of the plaintiffs. Khem Kunwar died, and after her death Ram Chandar, the son of Lal Singh, got possession of the whole of the 63 bighas 11 biswas *sir* land. On the 24th of April, 1902, Ram Chandar sold 14 bighas 13 biswas out of this *sir* land to one Husain Bakhsh. Thereupon a suit for pre-emption was preferred by Damar Singh and Shib Sahai. The defendant vendee replied that the plaintiffs were not entitled under the *wajib-ul-arz* to pre-empt, as Ram Chandar did not hold as a co-sharer, and the *wajib-ul-arz* only contemplated the case of a co-sharer selling. The provisions of the *wajib-ul-arz* as to the right of pre-emption were:—“Should any shareholder be desirous of transferring his share by way of sale, mortgage, lease or hypothecation, first of all ‘*shurkai zarf*’ would be entitled to purchase the property \* \* \*” The Court of first instance (Subordinate Judge of Shahjahanpur) held that Ram Chandar not being a shareholder in the village within the meaning of the *wajib-ul-arz*, the sale by him of the *sir* land did not give rise to a right of pre-emption, and that Court accordingly dismissed the suit. On appeal by one of the plaintiffs

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\* First Appeal No. 80 of 1903, from an order of C. D. Steel, Esq., District Judge of Shahjahanpur, dated the 25th of August 1903.

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the lower appellate Court (District Judge of Shahjahanpur) was of opinion that the sale by Ram Chandar did give rise to a right of pre-emption, and accordingly allowed the appeal and remanded the case under section 562 of the Code of Civil Procedure. From this order of remand the defendant vendee appealed to the High Court.

Mr. *S. B. Sarbadhicary*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

BLAIR and BANERJI, JJ.—This appeal arises out of a suit for pre-emption which was dismissed by the Court of first instance upon the ground that a claim for pre-emption does not arise in the case of a sale like the one in question. The facts as found are these:—Lal Singh and Thakur Das were the joint owners of a certain zamindari share in the village. They held 63 bighas 11 biswas of *sir* land and made a grant of it to their step-mother for her maintenance for life, to revert to them after her death. Subsequently the right of Lal Singh in the zamindari “except the rights in the *sir*” were sold by auction and purchased by the father of the present plaintiffs. After the death of the lady to whom the 63 bighas had been granted the said land reverted to and was taken possession of by Ram Chandar, the son of Lal Singh. Ram Chandar sold 14 bighas 13 biswas out of the 63 bighas to the defendant appellant, and it is in respect of this sale that a claim for pre-emption has been advanced. The claim is founded upon the terms of the *wajib-ul-arz*, which are to the effect that in the case of a transfer by a shareholder in the village other shareholders as detailed in the *wajib-ul-arz* would have a right of pre-emption. The question is whether the sale by Ram Chandar was a sale by a shareholder within the meaning of the *wajib-ul-arz*, and whether the plaintiffs have a right to claim pre-emption in respect of such a sale. It has been found by the lower appellate Court that Ram Chandar held the 63 bighas, a portion of which he has sold, as a subordinate owner and not as a co-sharer in the village having common rights and common obligations with the other shareholders in the zamindari. That being so Ram Chandar does not come under the category of persons a transfer by whom would give rise to the right of

pre-emption under the wajib-ul-arz. He cannot be regarded as a co-sharer in the village, nor can plaintiffs be deemed to be his co-sharers who possess under the wajib-ul-arza right of pre-emption. We think that the Court of first instance was right and that the plaintiffs' suit for pre-emption ought to be dismissed. We allow the appeal, set asidet he order of the Court below, and restore the decree of the Court of first instance with costs in all courts.

*Appeal decreed.*

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*Before Mr. Justice Blair and Mr. Justice Banerji.*

RAM SARUP (PLAINTIFF) v. SITAL PRASAD AND ANOTHER  
(DEFENDANTS).\*

1904  
April 14.

*Pre-emption—Wajib-ul-arz—Interpretation of document—Act No. XIX of 1873 (N.-W. P. Land Revenue Act), section 91—Regulation No. VII of 1822, section 9—Act No. I of 1872 (Indian Evidence Act), section 35—Parties to suit.*

*Held* that if the pre-emptive clause of a wajib-ul-arz does not show, and it is not otherwise proved, that such clause is merely the embodiment of a new contract as to pre-emption, the proper construction to be placed on such clause is that it is the recital of a pre-existing custom. *Ali Nasir Khan v. Manik Chand* (1), referred to.

*Held* also that the entries in a wajib-ul-arz made prior to the coming into force of Act No. XIX of 1873 as to local usages connected with landed tenures are relevant evidence under section 35 of the Evidence Act. *Kanta Prasad v. Chaturbhuj Sahai* (2) overruled. *Muhammad Hasan v. Munna Lal* (3) followed.

In a suit for pre-emption the vendor is not a necessary party. *Hira Lal v. Ramjas* (4) and *Lok Singh v. Balwan Singh* (5) followed.

THIS was a suit for pre-emption by one co-sharer against another co-sharer who had purchased a share from a third co-sharer in the same mahal. The claim was based on an alleged custom of pre-emption prevailing in the village. The Court of first instance (Munsif of Bansaon) found that the plaintiff had failed to prove the custom set up by him. On appeal the lower appellate Court (District Judge of Gorakhpur) laid down two points for decision:—(1) Has any custom of

\* Second Appeal No. 249 of 1902, from a decree of W. Tudball, Esq., District Judge of Gorakhpur, dated the 8th of January, 1902, confirming a decree of Babu Sheo Charan Lal, Munsif, of Gorakhpur, dated the 13th of September 1901.

(1) (1902) I. L. R., 25 All., 90. (3) (1886) I. L. R., 8 All., 434.  
(2) Weekly Notes, 1904, p. 117. (4) (1883) I. L. R., 6 All., 57.  
(5) Weekly Notes, 1903, p. 233.